

CAUSE NO. 2019-06610

JANE DOE

VS.

**BRENNANS OF HOUSTON, INC. d/b/a
BRENNANS OF HOUSTON**

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

80TH JUDICIAL DISTRICT

**DEFENDANT BRENNANS OF HOUSTON, INC.'S
SECOND AMENDED RULE 91a MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON** (“**BRENNANS**”), and files this its Second Amended Rule 91a Motion to Dismiss as to certain of Plaintiff, Jessica Crutcher’s, claims and/or causes of action, and would respectfully show unto this Honorable Court as follows:

I.

Plaintiff’s Current Allegations and Challenged Causes of Action

Plaintiff, Jessica Crutcher (“Crutcher”), filed her lawsuit against **BRENNANS** on January 28, 2019 seeking recovery of damages in excess of \$20,000,000 premised upon causes of action and/or theories of recovery, including: 1) sexual assault and battery; 2) aiding and abetting sexual assault; 3) Intentional Infliction of Emotional Distress; 4) Premises Liability; 5) Negligence; 6) Gross Negligence; 7) *Respondeat Superior*/Agency; and, 8) statutory liability for alleged violations of Chapter 2 of the Texas Alcoholic Beverage Code (the “Dram Shop” Act). **BRENNANS** filed its original Rule 91a Motion to Dismiss on March 29, 2019, within sixty (60) days after the first pleading containing the challenged causes of action was served upon **BRENNANS**. *See*, TEX. R. CIV. P. 91a.3(a). Pursuant to Local Rule 3.3.3, **BRENNANS’**

original Rule 91a Motion was set to be heard on the Court's April 22, 2019 submission docket. On April 3, 2019 – more than three days before the scheduled submission hearing on **BRENNANS'** original Rule 91a Motion -- Crutcher filed her Second Amended Petition amending the causes of action challenged by **BRENNANS'** original Rule 91a Motion.

On April 16, 2019, more than three days before the date of the submission hearing, **BRENNANS** filed its First Amended Rule 91a Motion to Dismiss in response to the amended causes of action asserted in Plaintiff's Second Amended Petition. A hearing by submission on **BRENNANS'** First Amended Rule 91a Motion to Dismiss is noticed for May 13, 2019. On May 3, 2019, Crutcher filed her Third Amended Petition again amending the causes of action made the basis of **BRENNANS'** First Amended Rule 91a Motion to Dismiss. On May 5, 2019, Crutcher filed her Response to **BRENNANS'** First Amended Rule 91a Motion to Dismiss.

In accordance with Rule 91a.5(b), before the date of the hearing on **BRENNANS'** First Amended Rule 91a Motion, **BRENNANS** now files this its Second Amended Rule 91a Motion to Dismiss.

Crutcher's Allegations - Crutcher alleges that on October 19, 2015, she was drugged by a bartender working for **BRENNANS** while Crutcher was drinking and dining at **BRENNANS**; and Crutcher further asserts that she was later repeatedly sexually assaulted at her home by the same bartender. Crutcher alleges that Defendant, Christopher Lockhart ("Lockhart"), aided and abetted the bartender's alleged sexual assault of Crutcher, and that Lockhart also assaulted Crutcher by "...intentionally or knowingly plac[ing] [Crutcher] in reasonable apprehension of imminent harmful or offensive contact" with the "present, apparent ability to cause the harmful or offensive contact". *See, Plaintiff's Third Amended Petition*, at pp. 11 and 12. Crutcher also alleges that she was "over-served" alcohol by the same bartender on the "night in question", and

that she became “visibly incapacitated”, and was “obviously impaired” and “severely impaired” after being over-served with alcohol.

Challenged Claims – In its original Rule 91a Motion to Dismiss, **BRENNANS** moved for dismissal with prejudice as to the following of Plaintiff’s claims and/or causes of action against it on the grounds that such claims and/or causes of action have no basis in law and/or no basis in fact:

- 1) sexual assault and battery;
- 2) aiding and abetting sexual assault;
- 3) Intentional Infliction of Emotional Distress; and,
- 4) Negligence and gross negligence claims premised upon vicarious liability theories such as *respondeat superior*, an employer’s right of control, and/or agency.

In her Second Amended Petition, Crutcher deleted Crutcher’s previously pled claim against **BRENNANS** for Intentional Infliction of Emotional Distress, as well as her claims against **BRENNANS** for “Sexual Assault and Battery” and for “Aiding and Abetting Sexual Assault and Battery”. In her Second Amended Petition, Crutcher amended her common law claims premised upon vicarious liability, including the inclusion of the express disclaimer, “To be clear, Plaintiff does not allege that Kerrigan or Lockhart were acting in the course and scope of their employment with **BRENNANS** when Kerrigan raped Plaintiff, with Lockhart’s aid and assistance”. See, *Plaintiff’s Second Amended Petition*, at p. 7. Crutcher amended her cause of action with respect to the alleged statutory violations of the Dram Shop Act by **BRENNANS**, adding a Section denominated as “Cause of Action 1: Dram Shop (Brennans)”, asserting that **BRENNANS** sold or provided alcoholic beverages to a person who was obviously intoxicated to the extent that they presented a clear danger to themselves and others, and that **BRENNANS**’ conduct in over-serving

alcohol to the “obviously intoxicated” Crutcher “contributed to Plaintiff’s state of intoxication and was a proximate cause of the injuries sustained by Plaintiff.” *See, Plaintiff’s Second Amended Petition*, at pp. 6-7.

Crutcher’s non-suit, or voluntary dismissal by means of Plaintiff’s Second Amended Petition, of her causes of action against **BRENNANS** for: 1) Intentional Infliction of Emotional Distress; 2) “Sexual Assault and Battery”; and, 3) “Aiding and Abetting Sexual Assault and Battery” mooted **BRENNANS**’ original Rule 91a Motion to Dismiss with respect to those withdrawn causes of action against **BRENNANS**. Likewise, the amendments made in Plaintiff’s Second Amended Petition expressly negating any allegation by Crutcher that the bartender or Lockhart were acting in the course and scope of their employment with **BRENNANS** when the bartender allegedly raped Crutcher, with Lockhart’s aid and assistance, and deleting the prior allegation that the bartender “was acting in the course and scope of his employment at **BRENNANS** when he drugged Plaintiff” mooted **BRENNANS**’ original Rule 91a Motion to Dismiss with respect to Crutcher’s claims of vicarious liability against **BRENNANS** premised upon the intentional torts allegedly committed by its employees. Accordingly, **BRENNANS**’ First Amended Rule 91a Motion to Dismiss did not address or seek a ruling on the three causes of action withdrawn by Plaintiff’s Second Amended Petition or with respect to Crutcher’s prior claims and causes of action against **BRENNANS** premised upon vicarious liability under the doctrine of *respondeat superior* as to the intentional torts allegedly committed by one or more of **BRENNANS**’ employees in purportedly drugging and sexually assaulting Crutcher.

Instead, **BRENNANS**’ First Amended Rule 91a Motion to Dismiss challenged the following of Crutcher’s common law causes of action against **BRENNANS**:

- 1) Cause of Action 2: Negligence (Brennans);

- 2) Cause of Action 3: Negligence *Per Se* (Brennans);
- 3) Cause of Action 4: Premises Liability (Brennans); and,
- 4) Cause of Action 5: Gross Negligence (Brennans).

Plaintiff's Third Amended Petition non-suited Crutcher's cause of action against **BRENNANS** for negligence *per se*. **BRENNANS'** Motion to Dismiss with respect to Crutcher's cause of action for negligence *per se* is rendered moot by Crutcher's timely withdrawal of that cause of action, and **BRENNANS'** therefore withdraws its Motion to Dismiss with respect to that claim. *See*, TEX. R. CIV. P. 91a.5. In this its Second Amended Rule 91a Motion to Dismiss **BRENNANS** reasserts its challenge to the following of Crutcher's common law causes of action against **BRENNANS** as amended by Plaintiff's Third Amended Petition:

- 1) Cause of Action 2: Negligence (Brennans);
- 2) Cause of Action 3: Premises Liability (Brennans); and,
- 3) Cause of Action 4: Gross Negligence (Brennans).

See, Plaintiff's Third Amended Petition at pp. 8 – 11.

Among other changes made by Crutcher in her Third Amended Petition as to her remaining common law causes of action, Crutcher added the qualifying phrase, "If it is determined that Plaintiff's impairment was a result of [the bartender's] drugging of Plaintiff, ..." to each of those causes of action.

II.

A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *See*, TEX.

R. CIV. P. 91a.1. Here, with respect to the challenged causes of action, Crutcher's common law causes of action are preempted by the exclusive remedy provision of the Dram Shop Act as explained below. Since, Crutcher's common law claims against **BRENNANS** are precluded by the Dram Shop Act's exclusive statutory remedy, the common law claims asserted by Crutcher against **BRENNANS** have no basis in law.

III. Argument and Authorities

In ruling on a Rule 91a motion, a court must decide "whether the pleadings, liberally construed, allege sufficient facts" that, if true, would "entitle the claimant to the relief sought." *See, City of Dallas v. Sanchez*, 494 S.W.3d 722, 724-25 (Tex. 2016) (quot. omitted); *see also* TEX. R. CIV. P. 91a.1 ("allegations, taken as true" must "entitle the claimant to the relief sought"). In determining whether a cause of action should be dismissed under Rule 91a, the Court must consider only the pleadings, and any pleading exhibits permitted under Rule 59. TEX. R. CIV. P. 91a.6.

When the plaintiff's own allegations, taken as true, trigger a clear legal bar to the plaintiff's claim, the cause of action has no basis in law. *See, Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App. – Corpus Christi-Edinburg 2017, no pet.) (*citing Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App. – Houston [1st Dist.] 2015, pet. denied, and noting that "*Dismissal is certainly appropriate when Texas has rejected the pleaded cause of action – or has rejected the viability of that action under the circumstances pleaded by the plaintiff.*"). *Id.* [Emphasis Added]. A plaintiff must plead sufficient facts to supply a legal basis for plaintiff's claims but not so much that she affirmatively negates her right to relief. *Id.*, at 609. As explained below, under the circumstances pleaded by Crutcher invoking the exclusive remedy of the Dram Shop

Act, Texas has rejected the viability of the common law causes of action asserted by Crutcher in her Third Amended Petition.

The Rule 91a pleading-sufficiency standard is similar to the federal courts' standard. *See Vasquez v. Legend Natural Gas III L.P.*, 492 S.W.3d 448, 452-456 (Tex. App. – San Antonio 2016, pet. denied), *citing Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As a result, Texas courts “find case law interpreting Rule 12(b)(6) instructive.” *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App. – Houston [14th Dist.] 2014, pet. den.); *see also Vasquez*, at 451 (*citing Wooley*). Under both the Rule 91a and the federal standard, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, at 678; *see also Vasquez*, at 451 (quoting same statement). As a result, while courts must accept a plaintiff’s “*factual* allegations as true, [courts] need not afford the same deference to [the] plaintiff’s *legal* conclusions or *conclusory* statements.” *Vasquez*, at 451 (emph. in orig.), *citing, among other cases, Twombly*, at 555.

“Negligence actions in Texas require a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach.” *Nabors Drilling U.S.A. Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009) (quot. omitted). A gross-negligence claim does not exist without an underlying negligence claim. *See, e.g., Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App. – Houston [14th Dist.] 1994, writ den.) (lack of legal duty defeated both ordinary-negligence and gross-negligence claims). The insufficiency of Plaintiff’s current petition as to any element of Crutcher’s challenged causes of action requires dismissal of such cause of action. Plaintiff’s Third Amended Petition does not allege sufficient facts to support the existence of a legal duty as to the challenged causes of action as to **BRENNANS**.

A. Exclusive Remedy Provision of Dram Shop Act Preempts Common Law Claims

In Plaintiff's Third Amended Petition, Crutcher directly asserts that **BRENNANS** violated the Dram Shop Act by serving, selling, or providing alcoholic beverages to a person who was obviously intoxicated to the extent that they presented a clear danger to themselves and others, and that **BRENNANS'** conduct in over-serving alcohol to the "obviously intoxicated" Crutcher "contributed to Plaintiff's state of intoxication and was a proximate cause of the injuries sustained by Plaintiff." *See, Plaintiff's Third Amended Petition*, at pp. 7-8. Crutcher readily concedes that, "At all relevant times, [Crutcher] was over the age of 18". *Id.*

Section 2.03 of the Texas Alcoholic Beverage Code (the "Dram Shop Act") provides as follows:

EXCLUSIVITY OF STATUTORY REMEDY.

- (a) The liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated **is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.**
- (b) This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter.
- (c) **This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.**

See, TEX. ALCO. BEV. CODE §2.03 [Emphasis Added].

The Texas Supreme Court has definitively held that the foregoing "exclusive remedy" provision of the Dram Shop Act means just what it says. *See, F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 687 (Tex. 2007) (*Read as written, in context, Section 2.03 simply means that the Dram Shop Act provides the exclusive remedy against an alcohol provider for damages caused by an intoxicated patron at least 18 years of age — i.e., common law remedies are no*

longer available. (citing *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 412 (Tex.2000)).

It matters not whether the injuries caused by the over-service of alcohol are to a third party or to the intoxicated patron – the exclusive remedy provision applies to both types of claims. *See, Id.*, at 691 [Emphasis Added] (*More specifically, the Dram Shop Act codifies the exclusive action against an alcohol provider for injuries or damages resulting from the intoxication of a patron. Id.* § 2.02. *The legislative intent to protect the public and provide a potential remedy against an alcohol provider does not equate to a guarantee of recovery against a provider by an injured party. The Act simply supplants in a single codified action all prior common law theories that previously could have been employed by the injured party (either a third party or the intoxicated patron himself) against a provider. See id. § 2.03.). See also, Borneman v. Steak & Ale of Tex., Inc.*, 62 S.W.3d 898, 908 (Tex. App. – Fort Worth 2001, no pet.) (Additionally, as previously noted, the legislature expressly pronounced the Dram Shop Act to be the exclusive remedy against providers of alcohol to individuals age eighteen or older. *Id.* § 2.03. The Act still further provides that the statutory cause of action " is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages." *Id.* (emphasis added). **This language clearly expresses legislative intent to exclude all common-law rights and bar all claims except those specifically authorized by the statute.** (Citing, *Smith v. Merritt*, 940 S.W.2d at 605, 608; *Southland Corp. v. Lewis*, 940 S.W.2d 83, 84 (Tex.1997) (**both stating that the Act's exclusive remedy provision clearly bars any common-law negligence or negligence per se causes of action**)).

The common law causes of action precluded by the Dram Shop Act's exclusive remedy provision include a claim based upon a premises liability theory. *See, Parker v. 20801, Inc.*, 194 S.W.3d 556, 560-563 (Tex. App. – Houston [14th Dist.] 2006, *rev'd on other grounds*)(disagreeing with appellant's contention that he can simultaneously pursue both dram shop and premises

liability causes of action, and holding in a case of first impression that a plain reading of Section 2.03 preempts a provider's common law duty as a premises owner.).

In Plaintiff's Response to **BRENNANS'** First Amended Rule 91a Motion to Dismiss, Crutcher argues -- without citing any case law in support -- that she is permitted by Rule 48 of the Texas Rules of Civil Procedure to assert the common law causes pled in her Third Amended Petition "in the alternative" to her claims under the Dram Shop Act, as the Dram Shop Act does not preempt common law claims that arise out of Crutcher's allegation that the bartender intentionally drugged Crutcher on the night in question. *See, Plaintiff's Response to Defendant's First Amended Rule 91a Motion to Dismiss*, at p. 10. In *Parker v. 20801, Inc.*, the Fourteenth Court of Appeals previously rejected an argument substantially similar to the argument made by Crutcher. *See, Parker v. 20801, Inc.*, 194 S.W.3d 556, 560-563 (Tex. App. – Houston [14th Dist.] 2006, *rev'd on other grounds*).

Parker was injured in an altercation in parking lot of Slick Willie's Family Pool Hall ("Slick Willie's") after Parker and his assailant, Anthony Griffin, were allegedly over-served with alcohol by Slick Willie's during a grand opening celebration. *Id.* Griffin punched Parker, causing Parker to fall and strike Parker's head on the pavement, fracturing Parker's skull and causing permanent brain damage. *Id.* In addition to his claims under the Dram Shop Act, Parker pled a cause of action based upon premises liability alleging that Slick Willie's duty to exercise reasonable care **to protect him from Griffin's intentional and criminal conduct** was the proximate cause of Parker's injuries. *Id.*, at 559. [Emphasis Added]. Parker alleged four specific ways in which Slick Willie's and its agents, servants, and employees were negligent: (1) in telling Parker to leave the pool hall without regard for his safety in the parking lot; (2) in failing to demand that Griffin leave the premises before Parker was injured; (3) in failing to timely notify the police; and (4) in

failing to warn Parker that Griffin was following him outside. *Id.* Parker argued that his premises liability claim arose from the intentional and criminal conduct of a third party (Griffin) rather than from Slick Willie's over-service of alcohol, and thus that his claim under the Dram Shop Act and his premises liability claim were not mutually exclusive. Despite its recognition that a defendant has a general common law duty to prevent the criminal acts of a third party when the criminal conduct is foreseeable as a result of the defendant's negligence, the Court of Appeals rejected Parker's argument, holding that, "**because [Parker's] premises liability claim is preempted by the Code**, the trial court did not err to the extent that it granted summary judgment against appellant's premises liability claim." *Id.*, at 563.

In Crutcher's Responses to **BRENNANS'** First Amended Rule 91a Motion to Dismiss, Crutcher argues – as did Parker -- that her common law causes of action and her statutory cause of action under the Dram Shop Act are not mutually exclusive, as Crutcher's common law claims are premised solely on the bartender's intentional conduct in allegedly drugging Crutcher, and not on the **BRENNANS'** bartender's alleged over-service of alcohol. Crutcher's attempt to artfully plead around the Dram Shop Act's exclusive remedy provision should be rejected just as the Court of Appeals rejected, under the "plain language" of the Dram Shop Act, Parker's attempt to proceed in the alternative with a premises liability claim based upon an intentional tort in addition to his exclusive claim for Slick Willie's alleged violation of the Dram Shop Act.

Crutcher's claims for exemplary or punitive damages under a gross negligence theory of recovery are also precluded because exemplary and/or punitive damages are not recoverable for an alleged violation of the Dram Shop Act, which statutory cause of action is Crutcher's exclusive remedy under the circumstances of this case. *See, Borneman v. Steak & Ale of Tex., Inc.*, 62 S.W.3d 898, 908 (Tex. App. – Fort Worth 2001, no pet.).

B. Rule 91a Dismissal Premised Upon an Affirmative Defense is Proper

Crutcher, citing cases from the Fort Worth and Amarillo Courts of Appeal, asserts that it is improper to grant a Rule 91a Motion to Dismiss based upon an affirmative defense, and that a claim of preemption premised upon the Dram Shop Act's exclusive remedy provision is an affirmative defense. *See, Plaintiff's Response to BRENNANS' First Amended Rule 91a Motion to Dismiss*, at p. 9.

Setting aside, for purposes of the present argument, the issue of whether the Dram Shop Act's exclusive remedy provision constitutes an immunity *from suit* depriving the court of subject matter jurisdiction, or an immunity *from liability*, and thus is an affirmative defense, Crutcher's overly broad assertion that a Rule 91a dismissal premised upon an affirmative defense is improper ignores a host of cases -- including the authorities from the Houston Courts of Appeal-- reaching the opposite conclusion, particularly where the affirmative defense can be established solely by reference to plaintiff's petition. *See, In re Essex Ins. Co.*, 450 S.W.3d 524, 525 (Tex. 2014) (*orig. proceeding*) (*per curiam*) (*dismissal on the basis of Texas' "no direct action" rule*); *Auzenne v. Great Lakes Reins. PLC*, 497 S.W.3d 35, 38 (Tex. App. – Houston [14th Dist.] 2016, no pet.); *Dailey v. Thorpe*, 445 S.W.2d 785, 789 (Tex. App. – Houston [1st Dist.] 2014, no pet.) (dismissal based upon controlling rule that an escrow agent's duty extends only through closing where plaintiff sued escrow agent for breach of fiduciary duty occurring after closing); *Estate of Sheshtawy*, 478 S.W.3d 82, 86-87 (Tex. App. – Houston [14th Dist.] 2015, no pet.) (*plaintiff's acknowledgment in her pleading that she assigned away her homestead rights in a settlement agreement triggering legal bar of waiver*); *Highland Capital Mgmt., L.P. v. Looper Reed & McGraw, PC*, No. 05-15-00055-CV, 2016 WL 164528, *6 (Tex. App. – Dallas Jan. 14, 2016, pet. denied) (Mem. Op.) (*dismissal based upon the affirmative defense of attorney immunity*); *Galan*

Family Tr. v. State, No. 03-15-00816-CV, 2017 WL 744250, at *3 (Tex. App. – Austin Feb. 24, 2017, pet. denied) (Mem. Op.) (*proper for the trial court to dismiss the Trust’s takings claim on affirmative defense of limitations based solely on the Trust’s pleadings*); *Guzder v. Haynes & Boone, LLP*, No. 01-13-00985-CV, 2015 WL 3423731, at *7 (Tex. App. – Houston [1st Dist.] May 28, 2015, no pet.) (Mem. Op.) (*dismissal on the basis of the affirmative defense of attorney immunity*); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754-55 (Tex. App. – Beaumont 2014, pet. denied) (*dismissal based upon immunity from suit under the Communications Decency Act*); *Bethel v. Quilling, Selander, Lownds Winslett & Moser, P.C.*, 05-17-00850-CV, May 30, 2018 (Mem. Op.) (*dismissal on the basis of the affirmative defense of attorney immunity*). Here, the court is not required to look beyond Crutcher’s own pleading of a claim under the Dram Shop Act to determine that her common law causes of action are barred by the Dram Shop Act’s exclusive remedy provision, as Crutcher has pled facts which, if true, bar her recovery under any of the common law causes of action she has asserted.

C. BRENNANS’ Motion to Dismiss Crutcher’s Amended Common Law Claims is Timely

On April 3, 2019 – more than three days before the scheduled submission hearing on **BRENNANS’** original Rule 91a Motion -- Crutcher filed her Second Amended Petition amending the causes of action challenged by **BRENNANS’** original Rule 91a Motion. Although Crutcher had indirectly alluded to being over-served in Plaintiff’s Original Petition, she amended her Second Amended Petition not only by including a separately pled cause of action alleging a violation of the Dram Shop Act, but also by deleting her claims for vicarious liability based upon the doctrine of *respondeat superior* as alleged at Section VII of Plaintiff’s Original Petition, as well as amending the factual bases for her claims of negligence and gross negligence. Plaintiff’s Second Amended Petition included a disclaimer stating, “To be clear, Plaintiff does not allege that

[the bartender] or Lockhart were acting in the course and scope of their employment with Brennans when [the bartender] raped Plaintiff, with Lockhart's aid and assistance." *See, Plaintiff's Second Amended Petition*, at p. 7. **BRENNANS** timely filed its First Amended Rule 91a Motion to Dismiss on April 16, more than three days before the date of the scheduled submission hearing on its original Rule 91a Motion to Dismiss.

In a similar fashion, Crutcher filed her Third Amended Petition on May 3, 2019 -- more than three days before the May 13 submission hearing on **BRENNANS'** First Amended Rule 91a Motion to Dismiss -- amending the causes of action challenged by **BRENNANS'** First Amended Rule 91a Motion. Following Crutcher's latest pleading amendment, **BRENNANS** timely has filed this its Second Amended Rule 91a Motion to Dismiss in advance of the May 13 submission hearing.

In her Response to **BRENNANS'** First Amended Motion to Dismiss, Crutcher attempts to gloss over the fact that she amended the causes of action asserted in her prior pleadings by euphemistically asserting that she "*clarified*" but continued to assert her Dram Shop ..." and common law claims in her Second Amended Petition. Crutcher also self-servingly claims that she simply "clarified" her Dram Shop and common law causes of action by filing her Third Amended Petition.

Rule 62 of the Texas Rules of Civil Procedure defines a pleading amendment thusly:

The object of an amendment, as contra-distinguished from a supplemental petition or answer is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense

permissible to the suit.

TEX. R. CIV. P. 62.

The changes made by Crutcher in her Second Amended Petition not only substantively added to any previously asserted cause of action under the Dram Shop Act, but also withdrew from Crutcher's common law causes of action her prior assertion of vicarious liability against **BRENNANS** premised upon the doctrine of *respondeat superior*. As Crutcher's Second Amended Petition amended each of the causes of action asserted in that pleading, **BRENNANS'** challenge to Crutcher's common law causes of action asserted in its First Amended Rule 91a Motion to Dismiss was proper and timely. *See*, TEX. R. CIV. P. 91a.5(b).

Similarly, although the common law causes of action pled by Crutcher in her Third Amended Petition are not "new" causes of action, each has been substantively amended, including but not limited to by Crutcher's inclusion of the qualifying language, "If it is determined that Plaintiff's impairment was a result of [the bartender's] drugging of Plaintiff ...," as well as by additional substantive changes to each of the common law causes of action asserted by Crutcher. Thus, **BRENNANS'** Second Amended Rule 91a Motion to Dismiss is timely as it has been filed before the date (May 13) of the submission hearing on **BRENNANS'** prior Motion.

Accordingly, after due notice and hearing, **BRENNANS'** Second Amended Motion to Dismiss as to Crutcher's common law claims and causes of action should be granted as the Dram Shop Act's exclusive remedy provision preempts and bars all such common law claims.

IV. Claim for Attorney's Fees and Costs

Pursuant to Rule 91a, should **BRENNANS** prevail on its Second Amended Motion to Dismiss as to the challenged common law claims and causes of action, **BRENNANS** would be

entitled to recover its reasonable and necessary attorney's fees and costs incurred in connection with **BRENNANS'** Motions to Dismiss: "[T]he court must award the prevailing party on the motion all costs and reasonable and necessary attorney's fees incurred with respect to the challenged cause of action in the trial court." TEX. R. CIV. P. 91a.7; TEX. CIV. PRAC. & REM. CODE 30.021. The fees awarded should include **BRENNANS'** reasonable and necessary appellate attorney's fees, if Crutcher appeals a ruling in favor of **BRENNANS**. See, *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 187-88 (Tex. App. – Houston [14th Dist.] 2015, pet. denied) ("Rather the word "all" [as used in Rule 91a] entails just that — "all" fees — which would include appellate fees, because they are part of the fees incurred to ultimately prevail, if the ruling is appealed."). To the extent **BRENNANS** is the prevailing party on its Second Amended Motion to Dismiss, **BRENNANS** reserves its right to submit evidence in support of the fees and costs incurred in preparing and arguing **BRENNANS'** Motions to Dismiss, through the date of the hearing and any appeal.

WHEREFORE, PREMISES CONSIDERED, Defendant, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON**, prays that the Court: 1) grant Defendant's Second Amended Rule 91a Motion to Dismiss; 2) order the dismissal with prejudice of Plaintiff's claims and/or causes of action against this Defendant made the subject of Defendant's Second Amended Rule 91a Motion to Dismiss; and, 3) award Defendant all reasonable and necessary attorney's fees and costs incurred in connection with Defendant's Rule 91a Motions to Dismiss. Defendant further prays for such other and further relief, both special and general, at law and in equity, to which this Defendant may show itself to be justly entitled.

Respectfully submitted,

BROTHERS ALVARADO, P.C.

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Brennans of Houston

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Defendant Brennans of Houston, Inc.'s Second Amended Rule 91a Motion to Dismiss* was served upon the following counsel of record in compliance with Rule 21a of the Texas Rules of Civil Procedure on this the 8th day of May, 2019, as follows:

VIA E-SERVICE

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By: /s/ Karen M. Alvarado
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